

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of FairPoint Communications, Inc., for)	WC Docket No. 07-66
Waiver of Section 61.41(b) and (c) of the)	
Commission's Rules)	

ORDER

Adopted: January 25, 2008

Released: January 25, 2008

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. By this order, we grant the petition of FairPoint Communications, Inc. (FairPoint) requesting that the Commission waive sections 61.41(b) and (c) of the Commission's rules.¹ FairPoint, a local exchange carrier subject to rate-of-return regulation, is acquiring certain telephone properties in Maine, New Hampshire, and Vermont from Verizon that are subject to price cap regulation.² FairPoint seeks a waiver of sections 61.41(b) and (c) of the Commission's rules—the “all-or-nothing” rule—to permit it to continue operating its existing telephone operations pursuant to rate-of-return regulation, while operating the properties it is acquiring from Verizon pursuant to price cap regulation.³ As discussed below, we find

¹ Petition of FairPoint Communications, Inc., for Waiver of Sections 61.41(b) and (c) of the Commission's Rules (filed Feb. 21, 2007) (FairPoint Petition). Public Notice of the FairPoint petition was provided on April 4, 2007. *Petition of FairPoint Communications, Inc., for a Waiver of the All-or-Nothing Rule in Connection with Its Acquisition of Certain Verizon Properties in Maine, New Hampshire, and Vermont*, WC Docket No. 07-66, Public Notice, DA 07-1612 (rel. Apr. 4, 2007).

² On January 31, 2007, Verizon and FairPoint filed a series of applications seeking authority to transfer certain section 214 authorizations and spectrum licenses from Verizon to FairPoint. On January 9, 2008, the Commission adopted an order approving the transfer, subject to certain conditions. *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, WC Docket No. 07-22, Memorandum Opinion and Order, FCC 07-226 (rel. Jan. 9, 2008) (*Verizon FairPoint Transfer Order*).

³ 47 C.F.R. §§ 61.41(b) and (c) (the all-or-nothing rule would require that FairPoint convert its rate-of-return regulated operations to price cap regulations). FairPoint provides wireline local exchange service to rural and small urban areas in 18 states. As of September 30, 2006, it served approximately 308,000 access line equivalents, including approximately 64,000 access lines in Maine, New Hampshire, and Vermont. FairPoint Petition at 3. FairPoint has entered into an Agreement and Plan of Merger (Merger Agreement) to acquire certain local exchange assets, and local and long-distance customer relationships, in Maine, New Hampshire, and Vermont from Verizon. *Id.* at 1. The acquisition will involve 352 exchanges serving approximately 1.5 million access lines. *Id.* at 3-4. None of the exchanges FairPoint is acquiring from Verizon overlap with any of FairPoint's (continued....)

that the public interest would be served by a grant of the requested waiver, subject to the outcome of the Commission's pending review of the all-or-nothing rule.

II. BACKGROUND

2. Section 61.41 of the Commission's rules is designed to ensure that all of a carrier's study areas and affiliates are subject to a single form of pricing regulation—either price cap regulation or rate-of-return regulation.⁴ This rule is commonly referred to as the “all-or-nothing” rule. Specifically, section 61.41 provides that, if an individual rate-of-return carrier or study area converts to price cap regulation, all of its affiliates or study areas must also do so, except for those using average schedules.⁵ This section also provides that, if a price cap carrier enters into a merger, acquisition, or similar transaction, it must continue to operate under price cap regulation after the transaction.⁶ In addition, when rate-of-return and price cap carriers merge or acquire one another, the rate-of-return carrier must convert to price cap regulation within one year.⁷ These requirements address two concerns the Commission has regarding mergers and acquisitions involving price cap and non-price cap companies. First, a carrier might attempt to shift costs from its price cap affiliates to its non-price cap affiliates.⁸ This would allow the rate-of-return affiliate to charge higher rates than would otherwise be permitted to recover its higher revenue requirement, while simultaneously increasing the profits of the price cap affiliate as a result of these cost savings.⁹ Second, a carrier might attempt to “game the system” by switching back and forth between rate-of-return regulation and price cap regulation.¹⁰ A rate-of-return carrier could build a large rate base in order to raise rates, and then return to price cap regulation and reduce costs to an efficient level, thereby maximizing its profits at the expense of ratepayers.¹¹

3. The all-or-nothing rule is under consideration in the *MAG Second Further Notice*.¹² In the *MAG Second Further Notice*, the Commission stated that it was looking at issues affecting alternative regulation plans for rate-of-return carriers and the modification or retention of the all-or-nothing rule as it

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existing exchanges in Maine, New Hampshire, and Vermont. *Id.* at 4. After the transaction closes, the acquired assets will be held in a subsidiary of FairPoint. *Id.* at 3.

⁴ 47 C.F.R. § 61.41.

⁵ 47 C.F.R. § 61.41(b).

⁶ 47 C.F.R. § 61.41(c)(1).

⁷ 47 C.F.R. § 61.41(c)(2). A rate-of-return carrier that acquires price cap lines can convert them back to rate-of-return, however, they may not convert them back to price cap regulation for five years. 47 C.F.R. § 61.41(e).

⁸ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, CC Docket Nos. 00- 256 and 96-45, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19781, para. 261 (2001) (*MAG Further Notice*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *MAG Second Further Notice*, 19 FCC Rcd at 4153-64, paras. 69-94. This examination was a continuation of the inquiry begun in the *MAG Further Notice*, 16 FCC Rcd 19703-11, paras. 213-40, 19717-24, paras. 260-71.

relates to the ability of rate-of-return carriers to elect an alternative regulation plan for only some of its study areas.¹³ The Commission tentatively concluded that any alternative regulation plan would be optional on the part of the rate-of-return carrier and would permit a rate-of-return carrier to elect participation in the alternative plan by study area.¹⁴ Finally, addressing outstanding waivers of the all-or-nothing rule, the Commission tentatively concluded that, whatever final rule it adopts with respect to the election of alternative regulation on a study area basis, that rule should also apply when carriers under different regulatory plans come together by merger or acquisition.¹⁵ The Commission accordingly determined that all outstanding interim waivers of the all-or-nothing rule that depend on the Commission's review of the all-or-nothing rule shall continue in effect until the Commission issues a final order.¹⁶

III. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.¹⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁰ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.²¹

5. We find good cause to grant FairPoint's request for waiver of the Commission's all-or-nothing rule. When the Commission adopted the all-or-nothing rule, it noted that it would entertain requests for waiver of the rule because efficiencies created by the purchase and sale of exchanges may outweigh the threat of cost shifting or gaming the system.²² In prior waiver orders, the Commission has observed that the public interest can be served by allowing smaller carriers to purchase exchanges.²³ The

¹³ *MAG Second Further Notice*, 19 FCC Rcd at 4161, para. 85.

¹⁴ *Id.* at 4161, para. 86.

¹⁵ *Id.* at 4164, para. 94.

¹⁶ *Id.* at 4129 n.40.

¹⁷ 47 C.F.R. § 1.3.

¹⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁰ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular Telephone*, 897 F.2d at 1166.

²¹ *Id.*

²² See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2706, n.207 (1991) (subsequent history omitted) (*LEC Price Cap Reconsideration Order*).

²³ See, e.g., *Citizens Telecommunications Company of Wyoming and Qwest Corp. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 16 FCC Rcd 3563, 3567, para. 11 (Com. Car. Bur. 2001) (*Citizens Waiver Order*); *Valor Telecommunications of Texas and GTE Southwest Inc. Joint Petition for Waiver of the Definition of "Study Area"* (continued....)

Commission also has noted that rate-of-return carriers confront numerous serious and complex issues regarding universal service support whenever the all-or-nothing rule requires them to convert to price cap regulation.²⁴

6. In the *Verizon FairPoint Transfer Order*, the Commission specifically ruled that FairPoint will be considered a Bell Operating Company for the purchased exchanges following this transaction, and will “step into Verizon’s shoes” for any regulatory obligations or relief to which Verizon is subject.²⁵ Because Verizon was subject to price cap regulation, it therefore follows that FairPoint should continue to operate the purchased exchanges under price cap regulation. We agree with FairPoint, however, that the Commission should not require FairPoint to convert all its legacy exchanges to price cap regulation simply because of this transaction.²⁶ The Commission has stated that, although it believes that incentive-based regulation is generally superior to rate-of-return regulation, it is sensitive to the needs of smaller carriers.²⁷ The overwhelming majority of FairPoint’s legacy exchanges are in low-density rural areas.²⁸ The Commission has determined that it would be inappropriate to subject these types of exchanges to price cap regulation.²⁹

7. Here, we believe that the benefits to be gained from the proposed merger outweigh any threat of gaming or cost shifting.³⁰ As FairPoint explains, cost shifting is less of a concern here because the acquired lines will be in a separate subsidiary from the rate-of-return exchanges and “state and federal tariff processes and the Commission’s cost accounting rules should prevent cost shifting among study areas, or make it easily detectable by federal and state regulators, access customers, and competitors.”³¹ To safeguard against possible gaming that could result from attempts to elect to take its rate-of-return exchanges to price cap regulation while these rules are under review, we require FairPoint to obtain prior Commission approval before seeking to elect price cap regulation for its rate-of-return exchanges.³² At (Continued from previous page)

Contained in the Part 36 Appendix-Glossary of the Commission's Rules, CC Docket No. 96-45, Order, 15 FCC Rcd 15816, 15821, para. 11 (Com. Car. Bur. 2000). *See generally Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9102, para. 323 (1995); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687, 1704, para. 88 (1994).

²⁴ See, e.g., *Valor Telecommunications, LLC Petition for Waiver of Section 61.41 of the Commission's Rules*, WCB/Pricing File No. 02-26, Memorandum Opinion and Order, 17 FCC Rcd 25544, 25547 para. 8 (WCB 2002); *ALLTEL Corporation Petition for Waiver of Section 61.41, et al.*, CCB/CPD Nos. 01-28, 99-01, 01-36, 01-30, and 99-36, Memorandum Opinion and Order, 17 FCC Rcd 27696, 27704, para. 20 (WCB 2002) (ALLTEL Waiver Order).

²⁵ *Verizon FairPoint Transfer Order* at paras. 33-36.

²⁶ FairPoint Petition at 7.

²⁷ See, e.g., *ALLTEL Corporation Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd 14191, 14202, para. 34 (Com. Car. Bur. 1999) (*ALLTEL/Aliant Order*).

²⁸ FairPoint Petition at 7.

²⁹ See *ALLTEL/Aliant Order*, 14 FCC Rcd at 14204, para. 35.

³⁰ For these reasons, we reject CWA’s arguments regarding cost shifting.

³¹ FairPoint Petition at 6.

that time, we can determine whether the transaction raises concerns addressed by section 61.41.

8. We reject CWA's arguments regarding the operation of mixed regulation affiliates because they are based on a misinterpretation of our precedent.³³ The Commission has granted several petitions that allowed an acquiring company to operate some affiliates under rate-of-return regulation and some affiliates under price cap regulation consistent with the type of relief that FairPoint is requesting.³⁴ CWA's reliance on the *ALLTEL/Aliant Order* to support its claim that a merged entity cannot operate under both rate-of-return and price cap regulation is also misplaced.³⁵ Indeed, the balance of interests noted above convince us that a waiver here is in the public interest.³⁶

9. In granting FairPoint's petition, we note that the Commission currently is considering whether to modify or eliminate the all-or-nothing rule.³⁷ We do not believe the public interest would be served by requiring FairPoint to undertake the burdens of converting its rate-of-return exchanges to price cap regulation based on a rule that may be modified or eliminated in the near future. This resolution is consistent with prior waivers to continue to allow rate-of-return carriers to continue to operate acquired lines under price cap regulation.³⁸ In sum, for the above reasons, we find good cause to grant the FairPoint request for waiver of the Commission's all-or-nothing rule and to allow it to retain its current regulatory status until the Commission concludes its review of the all-or-nothing rule in the *MAG Second*

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³² See *ALLTEL Waiver Order*, 17 FCC Rcd at 27699, para. 9.

³³ See CWA Comments at 3.

³⁴ For example, in 2006, the Commission granted a waiver to New Valor allowing it to operate the wireline properties of ALLTEL Holding Corp., a wholly-owned subsidiary of ALLTEL Corporation, under rate-of-return regulation while the study areas of Valor Communications Group, Inc. were allowed to continue operating under price cap regulation. *Valor Communications Group, Inc. (New Valor) Petition for Waiver*, WCB/Pricing No. 05-37, Order, 21 FCC Rcd 859, para. 1 (2006) (*New Valor Order*). In another case, the Commission granted three petitions that permitted carriers to continue to operate their existing exchanges under rate-of-return regulation until the Commission completes its review of the all-or-nothing rule, while operating the 284 acquired exchanges under price cap regulation. See *ALLTEL Waiver Order*, 17 FCC Rcd 27694.

³⁵ CWA Comments at 3-4. The *ALLTEL/Aliant Order* involved a request to convert the acquired price cap carrier (Aliant) back to rate-of-return regulation, thereby allowing it to operate both carriers as rate-of-return. Although the Commission granted the request, it never stated that a merged entity could not operate a mixed regulatory regime. See *ALLTEL/Aliant Order*, 14 FCC Rcd at 14204, para. 37.

³⁶ CWA's argument that the public interest would be served by requiring FairPoint to reduce its dividend is repetitious of its similar argument in the Verizon/FairPoint 214 proceeding. See *Verizon/FairPoint Transfer Order* at para. 21. There the Commission noted that FairPoint's issuance of dividends is discretionary and it found nothing in the record indicating that FairPoint would be unable to reduce dividend payments if necessary. *Id.* Moreover, as described above, the evidence here, overall, convinces us that granting the requested waiver is in the public interest. We, therefore, reject CWA's argument.

³⁷ See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, CC Docket Nos. 00-256 and 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122 (2004) (*MAG Second Further Notice*).

³⁸ See, e.g., *New Valor Order*, 21 FCC Rcd 859.

*Further Notice.*³⁹

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and pursuant to the authority delegated under sections 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291 that the petition for waiver of the Commission's rules, 47 C.F.R. §§ 61.41 (b) and (c) filed by FairPoint IS GRANTED, to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Dana R. Shaffer
Chief, Wireline Competition Bureau

³⁹ In the event the Commission modifies the all-or-nothing rule, we anticipate that it will provide carriers with some period of time to evaluate any changes to the rule before carriers are required to elect a particular form of pricing regulation. In the event the Commission chooses not to modify the rule, we expect that it will specify the time period in which carriers with pending waivers must come into compliance with the rule.